UNITED STATES OF AMERICA
Before the
OFFICE OF THRIFT SUPERVISION
DEPARTMENT OF THE TREASURY

In the Matter of	
LAWRENCE A. SWANSON, JR. Former Director and Chief Executive Officer of	Re: Case No. OTS AP ATL-93-7 OTS Order No. AP 95-05 Dated: January 24, 1995
FIDELITY FEDERAL SAVINGS BANK, a Federal Savings Bank, Dalton, Georgia	OTS Order No. AP 95-19 Dated: April 4, 1995

DECISION ON RECONSIDERATION

I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

The Southeast Regional Office of the OTS ("Enforcement") has filed a motion requesting the Acting Director to withdraw and reconsider the Final Decision and Order issued in the above-captioned proceeding on January 24, 1995. Respondent Lawrence A. Swanson, former director and chief executive officer of Fidelity Savings Bank of Dalton, GA, has replied to the motion.

For the reasons that follow, the Acting Director concludes that reconsideration of the Final Decision is appropriate for the purposes of revising one conclusion of law and clarifying certain other issues. However, the Acting Director does not believe that any change to the remedy is necessary.

II. BACKGROUND

On January 25, 1993, Enforcement issued a Notice of Charges and Hearing for an Order to Cease and Desist and for Affirmative Relief, Notice of Intention to Prohibit and Notice of Assessment of Civil Money Penalties (the "Notice"). Enforcement alleged several violations by Swanson relating to his acquisition and holding of Fidelity stock and to the payment of a bonus. Enforcement sought a cease and desist order (including restitution of $118,000 and other affirmative actions), a prohibition order, and civil money penalties of $112,073.

Following an administrative hearing and a Recommended Decision issued by an administrative law judge ("ALJ"), on January 24, 1995, the Acting Director issued a Final Decision in this matter. The Acting Director found that the Respondent violated statutes, regulations and agency-imposed conditions governing mutual-to-stock conversions, changes of control, accurate record keeping and false or misleading statements to examiners. The Final Decision included an Order: (1) requiring Respondent to cease and desist from statutory violations, regulatory violations, and violations of conditions imposed in writing; (2) directing Swanson to take specified affirmative actions in connection with Fidelity stock; and (3) directing Swanson to pay CMPs of $30,548. No prohibition or restitution was ordered.

On February 22, 1995, Enforcement filed a motion requesting the Acting Director to withdraw and reconsider the January 24, 1995 Final Decision and Order, to revise factual findings and legal conclusions contained in that Decision and to order a prohibition of the Respondent. On February 23, 1995, the Respondent filed a

petition for review of the Final Decision and Order with the United States Court of Appeals for the District of Columbia Circuit. Enforcement filed a supplement to its motion for withdrawal and reconsideration on February 23, 1995.

By Order issued February 23, 1995, the Acting Director stayed the effective dates of the Final Decision and Order and directed the parties to file additional briefs on the legal and policy issues involved. In accordance with the timetable set by the Acting Director, Respondent responded to Enforcement's motion on March 13, 1995, and Enforcement replied to Respondent's response on March 20, 1995.

On March 29, 1995, Respondent filed a motion for leave to file a surreply. Enforcement filed its opposition to this motion on March 30, 1995. To the extent that Enforcement's reply raised new issues including the inference that may be drawn from assertion of Fifth Amendment privileges, the surreply is accepted.

III. RECONSIDERATION

The OTS Rules of Practice and Procedures in Adjudicatory Proceedings codified at 12 C.F.R. Part 509 do not discuss motions for reconsideration of a Final Decision and Order. However, it is a long-standing principle of administrative law that the power to reconsider is inherent in the power to decide.[1] This principle is specifically incorporated in the agency's enforcement statute at 12 U.S.C. § 1818(h)(1) which states:

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[1] Spanish Int'l Broadcasting Co. v. FCC, 385 F.2d 615, 621 (D.C. Cir. 1967); In re Stoller, Docket No. FDIC-90-115e, 1992 FDIC Enf. Dec. (P-H) para. 5184 at A-2083, n.1.

> Unless a petition for review is timely filed in a court of appeals of the United States . . . , and thereafter until the record in the proceeding has been filed . . . , the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order.

Accordingly, the Acting Director concludes that it is within his power to entertain a motion for reconsideration.[2]

However, because the administrative process, like the judicial process, seeks finality, reconsideration is not a matter of right. Rather, it is a plea to the discretion of the administrative agency.[3] Such petitions are required to be granted only in extraordinary circumstances.[4] The moving party has the burden of persuading the tribunal to reconsider its order.[5] Both parties appear to agree that the standard for reconsideration is "an opportunity for the court to correct manifest errors of law or fact and review newly discovered evidence." See Taliaferro v. City of Kansas City, 128 F.R.C. 675, 677 (D. Kan. 1989). The Acting

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[2] Respondent argues that Enforcement has no authority to file a motion for reconsideration. Under 12 U.S.C. 1818(h)(1), the agency has broad discretion with regard to the procedures applicable to the modification, termination or withdrawal of a final decision and order. Respondent has cited, and the Acting Director perceives, no reason to preclude Enforcement from filing a motion for reconsideration.

[3] See ICC v. Jersey City, 322 U.S. 503, 514-15 (1944). See also CSX Transp. Inc. v. ICC, 952 F.2d 500, 505 (D.C. Cir. 1992); Cities of Campbell v. FERC, 770 F.2d 1180, 1191 (D.C. Cir. 1985); Mobil Oil Corp. v. ICC, 685 F.2d 624, 631-32 (D.C. Cir. 1982).

[4] See Cities of Campbell v. FERC, 770 F.2d 1180, 1191 (D.C. Cir. 1985); RSR Corporation v. FTC, 656 F.2d 718, 721 (D.C. Cir. 1981).

[5] See Simmons v. ICC, 760 F.2d 126, 132 (11th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); In re Jameson, Docket No. FDIC-89-83e, 1991 FDIC Enf. Dec. (P-H) para. 5154C at A-1542.25.

Director will employ this test here. To the extent that Enforcement seeks reconsideration of the Acting Director's supervisory judgment, a similar test should apply, that is, correction of a manifest error of supervisory judgment.

IV. ISSUES RAISED ON RECONSIDERATION.

In support of its motion for reconsideration, Enforcement argues that the Final Decision inappropriately failed to find that: (1) Swanson caused Fidelity's stock register to be inaccurate in violation of 12 C.F.R. § 563.170(c) and (2) Swanson's Control Act violations involved the requisite culpability to support a prohibition order under 12 U.S.C. §1818(e). Additionally, Enforcement argues the Acting Director inappropriately exercised his discretion by refusing to issue an industry-wide prohibition order against Swanson under 12 U.S.C. § 1818(e), notwithstanding his finding that the statutory requirements for prohibition were met.

A. Stock Register

Beginning in 1986, John McDonald, a Vice President and Director of Fidelity, made ten purchases of Fidelity stock on behalf of himself and Swanson. Pursuant to an agreement with Swanson, McDonald instructed Fidelity to issue two stock certificates of approximately equal value for each transaction. While both certificates were registered in McDonald's name on the stock register, McDonald subsequently endorsed and delivered one of the certificates to Swanson. As a result, Fidelity's stock register did not indicate that Swanson had any legal or beneficial interest in the shares registered in McDonald's name.

Enforcement contends that this scheme violated 12 C.F.R. § 563.170(c)(1). The regulation states, in pertinent part, that savings associations shall "establish and maintain such accounting and other records as will provide an accurate and complete record of all business that it transacts. . . ."[6] The Acting Director is unwilling to find, on the basis of the record in this case, that the use of McDonald's registration violated 12 C.F.R. § 563.170(c)(1). Although the Acting Director concluded in the Final Decision that this regulation was violated when Fidelity's proxy statements (1987-89), stock offering circular (1987) and management questionnaire (1991) incorrectly reported Respondent's holdings of stock, he is unable here to draw the same conclusions with regard to the stock register. Agency regulations elsewhere contemplate that there may be instances where the stock registrar's ledger will not reflect the identity of individuals involved in the purchase and sale of stock.[7] Other agency guidance makes the same point.[8]

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[6] See also 12 C.F.R. § 552.11(a)([e]ach Federal stock association shall keep correct and complete books and records of accounts; . . . and shall keep at its home office or at the office of its transfer agent or registrar, a record of its stockholders, giving the names and addresses of all stockholders, and the number, class and series, if any, of the shares held by each.")

[7] 12 C.F.R. § 552.6-3(b) provides:

> Transfer of shares of capital stock of the association shall be made only on its stock transfer books. Authority for such transfer shall be given only by the holder of record or by a legal representative, who shall furnish proper evidence of such authority, or by an attorney authorized by a duly executed power of attorney and filed with the association. The transfer shall be made only on surrender for cancellation of the certificate for the shares. The person in whose name shares of capital stand on the books of the association shall be deemed by the association to be the owner for all purposes.

[8] See Regulatory Handbook, Thrift Activities, Capital Stock and Ownership, Section 110, at 110.8 (Jan. 1994).

Of course, it remains essential that proxy statements, offering circulars and management questionnaires are accurate including the correct identities and amounts of the holdings of officers and directors, but on the stock register issue, the Acting Director declines to reconsider his conclusion.[9]

Culpability

From at least April 18, 1986, through May 1991, Swanson acted in concert with John McDonald to acquire and hold over 10 percent of the outstanding shares of Fidelity in violation of the Change of Control Act and applicable regulations.

The Acting Director found that Respondent's violations of the Control Act were sufficient to support the issuance of a cease and desist order and CMPs of $30,548.44. The Final Decision, however, found that Respondent's Control Act violations did not fulfill the statutory prerequisites for the issuance of an industry-wide prohibition order. Specifically, the Acting Director was unable to conclude that Respondent's conduct evinced requisite culpability under 12 U.S.C. § 1818(e)(1)(C). Enforcement requests reconsideration of these findings.

1. Willful or continuing disregard for the safety and soundness of the institution

Enforcement first argues that the Acting Director failed to

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[9] The failure of an officer or director to report accurately his interest in the stock of an institution he represents may, at least under some circumstances, represent a breach of his fiduciary duty of candor to the institution. Enforcement, however, does not raise this issue on reconsideration.

follow controlling precedent regarding the applicable standards for determining whether a violation involved willful or continuing disregard for the safety and soundness of the institution. See 12 U.S.C. § 1818(e)(1)(C)(ii).

Aspects of the "willful or continuing disregard" standard have been the subject of judicial attention over the past several years. The "willful or continuing disregard" standard was created by Congress in 1978 in order to provide:

> . . . statutory language which will give the regulatory agencies a less burdensome test [than personal dishonesty] under which they may institute removal proceedings. . . . [The] new standard will allow the agencies . . . to move against individuals who may not be acting in a fraudulent manner but who are nonetheless acting in a manner which threatens the soundness of the institution.

H. R. Rep. No. 1383, 95th Cong., 2d Sess. 18, reprinted in 1978 U.S. Code Cong. & Adm. News 9273, 9290.

The starting point in the case law is Brickner v. FDIC, 747 F.2d 1198 (8th Cir. 1984), where the court observed that "some showing of knowledge of wrongdoing" is required for either willful or continuing disregard. Id. at 1203. Put another way, the common noun "disregard" suggests voluntary inattention. See id. at 1203, n. 6. Brickner notes, however, that continuing disregard "does not require proof of the same degree of intent as 'willful disregard.'" Id at 1203. Accord, Oberstar v. FDIC, 987 F.2d 494, 502 (8th Cir. 1993).

Two other courts of appeals have also made broad and somewhat

similar statements. The Ninth Circuit has said that "OTS must show a degree of culpability well beyond mere negligence, i.e., there must be a showing of scienter." Kim v. OTS, 40 F.3d 1050, 1054 (9th Cir. 1994). The Eleventh Circuit has remarked that "[c]onduct sufficient to satisfy [the willful or continuing disregard standard] must have the same magnitude as personal dishonesty." Doolittle v. NCUA, 992 F.2d 1531, 1538 (11th Cir. 1993).[10]

The distinction between willful disregard and continuing disregard has received little attention since Brickner's statement that continuing disregard requires a lesser degree of intent than willful disregard. Indeed, the distinction appears to have been addressed only in one recent case, Grubb v. FDIC, 34 F.3d 956 (10th Cir. 1994). The Tenth Circuit explained that willful disregard is "deliberate conduct which exposed the bank to 'abnormal risk of loss or harm contrary to prudent banking practices.'" Id. at 961.[11] The element of deliberate conduct in Grubb was that the defendant director continued to receive extensions of credit despite warnings from bank examiners that the extensions were illegal. As to "continuing disregard," where the scienter required is less than

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[10] On a theoretical level, it may be difficult to reconcile the Eleventh Circuit's, "same magnitude" construction with the statement in the legislative history that "willful or continuing disregard" is intended to be "a less burdensome test" than personal dishonesty. This tension may not be especially relevant in particular factual circumstances, however.

[11] Grubb cites Van Dyke v. Board of Governors of the Federal Reserve System, 876 F.2d 1377 (8th Cir. 1989), a decision that focused on personal dishonesty, but that also affirmed the Board's conclusion that a check-kiting scheme that exposed a bank to an abnormal risk of loss or harm contrary to prudent banking practices demonstrated willful disregard for safety and soundness. See id. at 1380. The Eighth Circuit later explained Van Dyke as an instance of one of "many types of misconduct that, by their very nature, evidence willful disregard." Oberstar, 987 F.2d at 502-03.

for willful disregard, the Grubb court adopted the FDIC's definition: continuing disregard is conduct "voluntarily engaged in over a period of time with heedless indifference to the prospective consequences." Grubb, 34 F.3d at 961, quoting Docket No. FDIC-85-215e, 1986 FDIC Enf. Dec. (P-H) para. 5069 at A-944.

The OTS has articulated definitions of willful and continuing disregard in a comparable manner, drawing on the case law construing section 15 of the Securities Exchange Act, which imposes sanctions for willful violation of the securities laws, see 15 U.S.C. § 78o(b).[12] Willful disregard is established:

> when an individual: a) purposely (as opposed to accidentally) commits an act and that act evidences neglect or lack of thoughtful attention to the institution's safety and soundness, or b) acts with plain indifference to the institution's safety and soundness.

In re Kim, OTS Order No. AP 93-30, 22 (Apr. 15, 1993), vacated, Kim v. OTS, 40 F.3d 1050 (9th Cir. 1994); In re Seidman, OTS Order No AP 92-149, 26, n.29 (Dec. 4, 1992), rev'd, Seidman v. OTS, 37 F.3d 911 (3d Cir. 1994).[13] The agency went on to say that "the only

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[12] The case law includes Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965); Gilligan, Will & Co. v. SEC, 267 F.2d 461, 468 (2d Cir.) cert. denied, 361 U.S. 896 (1959); Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949).

The agency's willful disregard standard also follows closely interpretations of willfulness under the Commodity Exchange Act, 15 U.S.C. §§ 9, 12a(3)(A), see Lawrence v. CFTC, 759 F.2d 767, 773 (9th Cir. 1985); Flaxman v. CFTC, 697 F.2d 782, 787 (7th Cir. 1983).

[13] Although the courts of appeals in Kim and Seidman determined that the records in those cases did not support issuance of prohibition orders against the appealing parties, neither court took issue with the quoted standard. In Kim, the Ninth Circuit

requirement is that the individual acted intentionally in committing the acts which constitute the violation and was aware of or knew what he was doing." In re Kim, at 22-23. As to continuing disregard, the OTS has explained that this standard "requires some showing of knowledge of wrongdoing, [but] it does not require proof of the same degree of intent as 'willful disregard'." Id., at 23, quoting Brickner, 747 F.2d at 1203.[14]

In light of the discussions by the various courts of appeals, the OTS looks for "some showing of knowledge of wrongdoing" to support both willful and continuing disregard. See Brickner, 747 F.2d at 1203. In a typical case, the scienter required for willful disregard of safety or soundness may involve demonstrated awareness or prior warnings that the conduct at issue was unsafe or unsound, see Grubb, 34 F.3d at 963. Of course, "many types of misconduct," such as a check-kiting scheme or other conduct obviously directed at disrupting prudent operations at a savings association, "by their very nature evidence willful disregard." Oberstar, 987 F.2d

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concluded that approval of a few questionable loans and "a few relatively minor and technical violations of certain banking regulations" did not establish willful or continuing disregard. Kim v. OTS, 40 F.3d at 1055. In Seidman, the Third Circuit rejected a removal and prohibition order either because no violation or breach of duty had occurred or because no proscribed effect had resulted, but the court did not overturn the agency's culpability determinations. Seidman v. OTS, 37 F.3d at 929-39.

[14] The FDIC has explained willful and continuing disregard as follows:

> in the case of willful conduct, it is that conduct which is practiced deliberately in contemplation of the results, and in the case of continuing conduct, it is that conduct which is voluntarily engaged in over a period of time with heedless indifference to the consequences.

Docket No. FDIC-85-215e, 1986 FDIC Enf. Dec. (P-H) para. 5069 at A-944.

at 502-03. Willful disregard does not necessarily require evidence that the respondent understood that the particular conduct or activity violated rules or regulations, or were unsafe or unsound.

Proof of continuing disregard ordinarily would include evidence of a respondent's voluntary and repeated inattention to matters in a way that would pose an abnormal risk of loss to an institution. Continuing disregard exists when an individual has caused or permitted a savings association to engage in repeated violations of laws, rules or regulations or in an unsafe or unsound practice.[15] For example, knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing would constitute continuing disregard. See Brickner, 747 F.2d at 1203.

In this proceeding, the ALJ found that Swanson was aware of, and intended to comply with, a 10 percent limitation on stock ownership, that he did not realize that his concerted action with McDonald would result in the aggregation of their shares for the purposes of control, and that Swanson's violations were "unknowing, unintentional, and inadvertent."[16] This finding appears to be based upon the entire record and inferences drawn from the record. The Acting Director adopted this factual determination, with an additional reference to Swanson's deposition testimony.[17]

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[15] See Steadman v. SEC, 603 F.2d 1126, 1135 (5th Cir. 1979), aff'd, 450 U.S. 91 (1981).

[16] RD at 31, 34 and 35.

[17] FD&O at 19-20, citing Jt. Ex. 2B, Respondent's Dep. at 9-10 ("I . . . never had any idea that I was close to having ten percent ownership of the bank . . . I've always been aware that if I owned ten percent, that I'd have to file a change of control

Enforcement asserts that other record evidence outweighs Respondent's testimony. It argues that Swanson knew or was on notice that his conduct could be construed as acting in concert based on circumstantial evidence including his numerous joint purchases with McDonald, joint borrowings and extensions of credit involving McDonald, a 1983 buy-sell agreement with McDonald and the lack of any evidence that Swanson sought the advice of counsel on this issue.[18] Enforcement further argues that the fact finders should have drawn an adverse inference regarding Swanson's scienter based upon his failure to testify at the hearing.

Enforcement, in substance, objects to the weight accorded to the evidence and to the failure of the fact finders to draw certain

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. . . that's pretty standard knowledge.")

On reconsideration, Enforcement argues that the cited deposition should not have been a part of the record because: (1) Enforcement had no opportunity to object to the introduction of the deposition; and (2) the deposition was incompetent hearsay. The argument that Enforcement had no opportunity to object to the admission of this evidence is baseless. Enforcement agreed to include Respondent's deposition as a joint hearing exhibit in this proceeding. Tr. at 54-60. The hearsay argument was waived by Enforcement's failure to register a timely objection. 12 C.F.R. § 509.36(d).

[18] Enforcement also notes that officers and directors are presumed to know the regulations governing thrifts, citing FDIC v. Merrill, 332 U.S. 380-385 (1947), and Heritage Bank & Trust Co. v. Abdnor, 705 F. Supp. 439, 441-42 (N.D. Ill.1989). The application of this presumption in determining whether a respondent has the requisite culpability under the willful and continuing disregard standard would nullify the Circuit Courts' requirement for some evidence of knowledge of wrongdoing in all cases involving officers or directors. Accordingly, the Acting Director declines to apply this presumption here.

inferences from this evidence,[19] arguments that substantially repeat the arguments raised in its Exceptions to the Recommended Decision. Although the record is not overwhelming as to Swanson's knowledge of the aggregation rule, neither is it compelling that Swanson's conduct demonstrated willful or continuing disregard of the rule. Accordingly, the conclusion on willful and continuing disregard will not be modified.[20]

2. Personal dishonesty

The Final Decision found that the Respondent used nominees and misstatements in the institution records to conceal his stock ownership from his ex-wife and the courts in divorce proceedings. The Final Decision, however, did not conclude that these acts of personal dishonesty supported the issuance of a prohibition order based on the control violation. The Final Decision stated:

> The statute requires a showing that a violation "involved" personal dishonesty. There is no nexus between Respondent's deception and the control violations because the cited deceit neither disguised nor advanced the control violation. FD&O at 20 (footnotes omitted).

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[19] Enforcement's argument that an adverse inference may be drawn from Respondent's assertion of his Fifth Amendment privilege has no factual basis in the record. To the extent that an adverse inference may be drawn from Respondent's failure to testify at the hearing, Respondent argues, and Enforcement concedes, that the decision whether to draw is within the discretion of the fact finder. See e.g., Lopez v. OTS. 960 F.2d 958, 965 (11th Cir. 1992).

[20] Similarly, the Acting Director will not revise his determination that pre-FIRREA Control Act violations were not willful. Accordingly, the Final Decision appropriately declined to impose CMPs for violations occurring prior to August 9, 1989. FD&O at 25, n. 29. See 12 U.S.C. § 1730(q)(17)(1982), redesignated at 12 U.S.C. § 1730(q)(18)(Supp. IV 1986 & 1988)

Enforcement argues that this conclusion is incorrect. The Acting Director agrees and will reconsider and revise his Final Decision on this point.

In the above-cited finding, the Final Decision focused on the issue of whether Respondent's and McDonald's aggregated holdings exceeded the regulatory threshold of 10 percent of Fidelity stock. Since their aggregated holdings would have been the same regardless of which individual held the stock, the Final Decision found that Swanson's attempts to conceal stock purchases from his wife neither advanced nor disguised his Control violation.

The record also shows, however, that Swanson's use of nominees and his misstatements in the records concealed Swanson's and McDonald's actions in concert to acquire control. Specifically, the cited deceit hid the fact that Swanson and McDonald made repeated parallel purchases of stock, including certain purchases that raised regulatory presumptions of concerted action. See 12 C.F.R. § 574.4(d)(3)(ii). Since Swanson's acts of personal dishonesty camouflaged these concerted actions from Fidelity and from the regulator, the appropriate conclusion is that the Control violations did involve personal dishonesty. Accordingly, the Acting Director revises the Final Decision to add the following findings: Swanson, an institution-affiliated party, violated the Control Act and agency regulations implementing the Control Act; by reason of these violations, Swanson received a financial gain or other benefit through his acquisition of shares of Fidelity stock that he otherwise could not legally acquire, and Fidelity, an insured depository institution, suffered damage in the form of misstated records; and the Control violations involved personal dishonesty. Accordingly, the statutory prerequisites for the

issuance of a prohibition order based on the control violations are met.[21]

C. Agency Discretion

The Final Decision directed Respondent to pay CMPs totalling of $30,548;[22] and required Swanson to cease and desist from engaging in any acts, omissions, or practices involving violations of law or regulations or conditions imposed by the agency. In connection with the cease and desist order, Swanson was also required to take certain affirmative actions specifically designed to correct the conditions resulting from the cited violations and practices. These affirmative remedies prohibit Swanson from: purchasing Fidelity stock; selling Fidelity stock to McDonald; soliciting proxies from or granting proxies to McDonald; agreeing with McDonald on how to vote Fidelity stock; and voting Fidelity stock for the election or termination of directors, or for any matter concerning officers or employees at Fidelity.

The Acting Director, in an exercise of his discretion, declined to issue an order prohibiting Swanson from further participation in the industry. On reconsideration, Enforcement objects to this exercise of discretion and requests the entry of an

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[21] 12 U.S.C. § 1818(e)(1)(Supp. II 1990) and 12 U.S.C. 1464(d)(4)(1982 & 1988).

[22] In its motion for reconsideration, Enforcement raised an objection to the CMP amount. Specifically, Enforcement objects to a proposed decrease of 25% to the CMP for the factor of "harm to the institution." Enforcement previously had urged a 60% reduction of the CMP figure for this factor. See Enforcement's Reply to Exceptions, Exhibit B, page 63-64. The Acting Director declines to modify this amount.

industry-wide prohibition order.

Section 1818(e) grants the banking agencies broad discretion on whether to issue a prohibition order where the legal requirements for such an order have been meet:

> [i]f upon the record made at such hearing the agency shall find that any of the grounds specified in such notice have been established, the agency may issue such orders of suspension or removal from office, or prohibition from participation in the conduct of the affairs of the depository institution, as it may deem appropriate (emphasis added).[23]

Once an agency concludes that a party has engaged in an unlawful practice, it has considerable discretion in selecting the administrative remedies appropriate to the violation.[24] See e.g., Brickner, 747 F.2d at 1203. The agency's choice of sanctions will not be overturned unless unwarranted in law or without justification in fact. Butz v. Glover Livestock Commission Co., 411 U.S. 182, 186 (1973); Grubb, 34 F.3d at 963; Akin v. OTS, 950 F.2d 1180, 1183 (5th Cir. 1992); Brickner, 747 F.2d at 1203.

Enforcement argues that it had no opportunity to address whether the Acting Director's exercise of discretion was appropriate in this case. The issue of discretion is implicit in every case, and in this case Respondent's exceptions and post

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[23] 12 U.S.C. § 1818(e)(4).

[24] "The breadth of agency discretion is, if anything, at its zenith when the action relates . . . to the fashioning of . . . remedies and sanctions, including enforcement . . . programs in order to arrive a maximum effectuation of congressional objectives." Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967).

hearing brief urged the OTS to decline to issue a prohibition order, notwithstanding the fact that the statutory prerequisites were met. See Respondent Exception "J" and Post-Hearing Brief at 74-76.

Enforcement also suggests various factors that may be considered in this and future enforcement actions. The choice of sanctions is a matter that is dependent on the circumstances of each case, and is a determination that does not lend itself to precise categorization. Although Enforcement's suggestions are not unhelpful, the Acting Director declines to fix the factors that he will consider in selecting remedies, other than to state that the sanctions chosen must bear a reasonable relationship to the goals of the governing legislation.[25]

Enforcement argues that the remedies imposed in the Final Decision are an ineffectual response to the severity of Swanson's conduct. The enforcement remedies imposed against Respondent in this proceeding adequately serve the supervisory objectives of the agency by penalizing Respondent's past conduct and by deterring future unlawful acts. Swanson has incurred a substantial monetary penalty for his past Control Act violations. This remedy serves both as a meaningful sanction for these violations and as a persuasive deterrent to future violations by Respondent and others. The cease and desist order, including the specific affirmative action provisions, effectively deter and prevent any respondent's future abuses, correct conditions which have resulted in the unsafe and unsound practices, and protect the institution and its

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[25] See Barnum v. NTSB, 595 F.2d 869, 872-73 (D.C. Cir. 1979).

shareholders in the future.[26] In the future, Swanson must act with the knowledge that any deviation from that cease and desist order and the specific affirmative actions required in connection with that order -- whether purposeful or otherwise -- may result in the imposition of significant additional penalties. See Abercrombie v. Clark, 920 F.2d 1351, 1359 (7th Cir. 1990), cert. denied, 502 U.S. 809 (1991). Reconsideration therefore is denied.[27]

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[26] First National Bank of Wayne County v. FDIC, 770 F.2d 81, 82 (6th Cir. 1985).

[27] In arguing the appropriateness of the selected sanctions, both parties contrast Swanson's conduct with that of respondents in other proceedings in which a prohibition order has been issued. The Supreme Court, however, has stated that the employment of a sanction within the authority of an administrative agency is not rendered invalid in a particular case because it is more or less severe than sanctions imposed in other cases. Absent discrimination based on an invidious classification or in retaliation for an assertion of rights, different sanctions for similarly situated violators will be upheld. Butz, 411 U.S. at 187-88.

IT IS, THEREFORE, HEREBY ORDERED that:

1. Enforcement's motion for reconsideration of the Final Decision issued January 24, 1995 is granted.

2. Respondent's motion for leave to file a surreply is granted.

3. The Final Decision issued January 24, 1995 is modified consistent with the text of today's decision.

4. The effective dates of the Orders served in this proceeding on January 24, 1995 and stayed by Order issued February 23, 1995 are revised. These Orders are effective immediately upon service upon Respondent and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order have been stayed, modified, terminated or set aside by action of the Director or a reviewing court, or in accordance with any applicable statute or regulation.

5. This order shall be effective immediately upon service.

THE OFFICE OF THRIFT SUPERVISION

Dated: April 3, 1995

By: Jonathan L. Fiechter
Jonathan L. Fiechter
Acting Director

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of April, 1995, a copy of the foregoing OTS Order No. AP 95-19 was served by hand delivery, facsimile and first class mail on the following:

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